



U.S. Department
of Transportation

Research and
Special Programs
Administration

Office of the
Chief Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

MAY - 9 2003

Ref. No. 04-0038

Lawrence W. Bierlein, Esq.
McCarthy, Sweeney & Harkaway, P.C.
Suite 600
2175 K Street, N.W.
Washington, D.C. 20037

Dear Mr. Bierlein:

This responds to your request for a retraction of a letter of interpretation issued by the Research and Special Programs Administration's Office of Hazardous Materials Standards (OHMS) concerning the definition under the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) of a "manufacturer" of a cargo tank, cargo tank motor vehicle, or cargo tank equipment that forms part of the cargo tank wall. Specifically, you suggest that OHMS erred when it interpreted the definition to include persons who attach a cargo tank to a motor vehicle by strapping or other means that do not involve welding to the cargo tank wall.

The definition in question is contained in § 178.320(a) of the HMR. The definition reads as follows:

Manufacturer means any person engaged in the manufacture of a DOT specification cargo tank, cargo tank motor vehicle, or cargo tank equipment which forms part of the cargo tank wall. This term includes attaching a cargo tank to a motor vehicle or to a motor vehicle suspension component which involves welding on the cargo tank wall. A manufacturer shall register with the Department in accordance with subpart F of part 107 in subchapter A of this chapter.

As your letter notes, the definition was most recently revised in 1996 under a final rule issued under Docket HM-189M. The preamble to the HM-189M final rule stated that the definition was revised to clarify that the term does not include persons (assemblers) who attach a cargo tank to the motor vehicle or to motor vehicle component if no welding to the cargo tank wall is involved. Our intention in revising the definition in 1996 was to clarify that manufacturers who do not perform operations involving welding to a cargo tank wall need not be authorized ASME manufacturing/repair facilities. We did not intend to limit the definition of "manufacturer" only to persons who perform operations involving welding.



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I agree that the definition for "manufacturer" in § 178.320(a) when read alongside the 1996 preamble language is ambiguous and confusing, at best. For this reason, RSPA will withdraw the October 21, 2002 interpretation addressed to Sergeant Eric C. Adair, New York State Police. We will address the ambiguity of the current definition in a future rulemaking.

Sincerely,

A handwritten signature in dark ink, appearing to read "Nancy E. Machado", with a stylized flourish at the end.

Nancy E. Machado
Assistant Chief Counsel
for Hazardous Materials Safety

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March 21, 2003

Nancy Machado, Esq.
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Dear Ms. Machado:

On behalf of the National Propane Gas Association, Inc. (NPGA), I would like you to review the attached documents and as counsel ultimately retract a letter of clarification issued by Regulations.

On October 21, 2002, endeavoring to respond to an inquiry from a State enforcement official, Del Billings wrote the attached letter (Ref. No. 02-0257). In this letter, he concluded that a person "who removes an existing MC331 cargo tank from a chassis and places it on a new chassis, by means of strapping or welding *or non-welding methods*, meets the definition of a manufacturer," as that term is defined in 49 CFR 178.320(a)(Italics added). I understand there was considerable pressure to get this letter out in a hurry.

The rulemaking record for Section 178.320(a), however, shows the letter to be in error. Specifically, in HM-189M (61 Fed Reg. 51334, 51335; Oct. 1, 1996), DOT stated: "The definition for 'Manufacturer' is revised to clarify that this term does *not* include persons (assemblers) who attach a cargo tank to the motor vehicle, or to a motor vehicle component if it involves no welding on the cargo tank wall." (Italics added.)

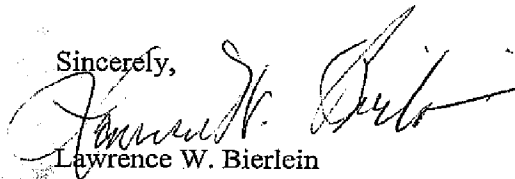
The letter of clarification says the opposite of what was intended when the regulation was adopted and, as such, is not within the permissible realm of interpretation. Although we have pointed this out, the letter continues to be quoted back to us as if it were correct. If the assembler who does not weld on the tank wall were a "manufacturer," this reading of the regulation would have a series of ripple effects in Parts 107, 173, 178, and 180. The only appropriate mechanism for such a significant change is notice-and-comment rulemaking.

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We do not need a new letter of clarification, because to us the rule is clear as it stands. What we do need and request, however, is an explicit retraction of the letter and removal of the letter from the RSPA web site where it now appears.

Please contact me if you have any questions on this request.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lawrence W. Bierlein", written in dark ink.

Lawrence W. Bierlein